



November 9, 1999

Ms. Elaine Hengen  
Assistant City Attorney  
City of El Paso  
Civic Center Plaza  
El Paso, Texas 79901-1196

OR99-3188

Dear Ms. Hengen:

You have asked whether certain information is subject to required public disclosure under the Public Information Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 129239.

The El Paso Police Department (the "department") received two requests for information concerning a specified public employee. In response to the request, you submit to this office for review the information which you assert is responsive.<sup>1</sup> You state that the department will make available to the requestor some responsive information. You contend, however, that the submitted records are excepted from required public disclosure by sections 552.103 and 552.117 of the Government Code. We have considered the exceptions and arguments you raise, and have reviewed the information submitted.

Section 552.103(a), the "litigation exception" excepts from disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

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<sup>1</sup>You have also submitted to this office information that apparently was sent for informational purposes only. In this ruling, we do not address the public disclosure of that information.

The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The department must meet both prongs of this test for information to be excepted under section 552.103(a). Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the department must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989).

Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You claim that Exhibit B is related to a "lawsuit alleg[ing] multiple claims of discrimination based on actions of several City employees," as well as a pending claim with the Equal Employment Opportunity Commission ("EEOC"), both relating to the subject of the pending request. You have submitted a copy of the petition in the pending lawsuit, Exhibit C, and a copy of the EEOC charge, Exhibit D, in support of your claimed exception. This office has stated that a pending Equal Employment Opportunity Commission ("EEOC") complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). By showing that a complaint that has been filed with the EEOC and the Texas Commission on Human Rights, you have shown that litigation is reasonably anticipated. Based upon the information provided and your arguments, we agree that you have shown that the requested records are related to pending or anticipated litigation. Thus, the department has met both prongs of section 552.103(a). Therefore, we conclude that the department may withhold the information at issue from disclosure under section 552.103(a) of the Government Code.

Generally, however, absent special circumstances, once information has been obtained by all parties to the litigation, either through discovery or otherwise, no section 552.103 interest

exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed.<sup>2</sup> Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We next consider your assertion that the department "may withhold the addresses and telephone numbers of City employees." Section 552.117 of the Government Code excepts from public disclosure information relating to the home address, home telephone number, and social security number of a current or former government employee or official, as well as information revealing whether that employee or official has family members. Section 552.117 requires the department to withhold this information for an official, employee, or former employee who requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). In this instance, if the individuals whose information is at issue have "requested that this information not be made available to the public," then such information must be withheld. You may not, however, withhold this information if the employee had not made a request for confidentiality under section 552.024 prior to the time this request for the documents was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 at 5 (1989). Accordingly, you must redact the information subject to section 552.117 wherever it is located in the submitted records.<sup>3</sup>

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Sam Haddad

Assistant Attorney General  
Open Records Division

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<sup>2</sup>We note that basic information in an offense report generally may not be withheld under section 552.103. *Cf.* Open Records Decision No. 597 (1991).

<sup>3</sup>We note that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information.

SH/nc

Ref.: ID# 129239

Encl. Submitted documents

cc: Mr. Alfred Charles  
72 Marietta St.  
Atlanta, Georgia 30303  
(w/o enclosures)